

FEB 3 1978

MICHAEL RODAK, JR., CLERK

No. 77-871

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**In the Supreme Court of the United States**

OCTOBER TERM, 1977

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**DELTA AIR LINES, INC., PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## INDEX

	Page
Opinions below.....	1
Jurisdiction .....	1
Question presented.....	2
Statement .....	2
Argument .....	4
Conclusion .....	10

### CITATIONS

#### Cases:

<i>Baker v. Schofield</i> , 243 U.S. 114.....	7
<i>Baumgartner v. United States</i> , 322 U.S. 665.....	5, 6
<i>Blau v. Lehman</i> , 368 U.S. 403.....	7
<i>Faulkner v. Gibbs</i> , 338 U.S. 267.....	7
<i>Ford v. Flaherty</i> , 364 Mass. 382, 305 N.E. 2d 112....	2
<i>Graver Tank &amp; Manufacturing Co. v. Linde Air Products Co.</i> , 336 U.S. 271.....	7
<i>Ingham v. Eastern Air Lines, Inc.</i> , 373 F. 2d 227....	4
<i>Kohr v. Allegheny Airlines, Inc.</i> , 504 F. 2d 400, certiorari denied <i>sub nom. Forth Corp. v. Allegheny Airlines, Inc.</i> , 421 U.S. 978.....	9
<i>McAllister v. United States</i> , 348 U.S. 19.....	6
<i>Michael v. United States</i> , 338 F. 2d 219.....	4
<i>Miree v. DeKalb County, Georgia</i> , No. 76-607, decided June 21, 1977.....	9
<i>Quinn v. United States</i> , 439 F. 2d 335.....	4
<i>Towson v. Moore</i> , 173 U.S. 17.....	7
<i>United States v. Chemical Foundation, Inc.</i> , 272 U.S. 1 .....	7
<i>United States v. Commercial Credit Co.</i> , 286 U.S. 63..	7
<i>United States v. Dickinson</i> , 331 U.S. 745.....	7

#### Statutes and rule:

Massachusetts General Laws, Chapter 231B.....	2
Federal Rules of Civil Procedure, Rule 52(a).....	4

#### Miscellaneous:

5A <i>Moore's Federal Practice</i> (2d ed. 1977).....	4
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**In the Supreme Court of the United States**

OCTOBER TERM, 1977

No. 77-671

DELTA AIR LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 561 F. 2d 381. The opinion of the district court (Pet. App. 34a-121a) is reported at 412 F. Supp. 959.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. 122a) was entered on August 12, 1977. The petition for a writ of certiorari was filed on November 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

## QUESTION PRESENTED

Whether the district court's findings concerning proximate causation were clearly erroneous.

## STATEMENT

In this suit under the Federal Tort Claims Act, petitioner sought contribution and indemnity from the United States for damages petitioner paid to the estates of passengers who were killed when Delta Flight 723 (D 723) crashed at Logan International Airport, Boston, Massachusetts, on July 31, 1973.<sup>1</sup> Petitioner also sought to recover the value of its aircraft.<sup>2</sup>

Twenty-six witnesses testified at trial, and much supplementary material was entered into the record, including depositions, documentary exhibits, graphs, photographs and a transcript of the cockpit voice recording made during the final minutes of Flight 723.

<sup>1</sup> Delta conceded its own liability to the estates of the deceased passengers. Wrongful death suits filed against the carrier were resolved by settlement or trial on damages only (Pet. 5).

<sup>2</sup> The trial concerned petitioner's claims against the United States for contribution under the Massachusetts contribution statute, Massachusetts General Laws, Chapter 231B, and for the loss of the aircraft. The district court dismissed those claims for contribution that arose from actions brought under the Massachusetts wrongful death statute. That statute, unlike the other state wrongful death laws under which petitioner was sued, apportions liability according to fault. An individual defendant is thereby precluded from paying more than his pro rata share of liability, and no right to contribution can arise under Chapter 231B. The court also dismissed petitioner's indemnity claims, because Massachusetts law does not recognize indemnity in favor of a tortfeasor who is actively negligent. *Ford v. Flaherty*, 364 Mass. 382, 305 N.E. 2d 112.

In addition, the district judge personally visited and observed operations at the Terminal Radar Approach Control Room in Boston and the control tower cab at Logan Airport. The judge also spent approximately one-half hour in the pilot's seat of a Delta DC-9, examining the instrument panel and other portions of the cockpit under the tutelage of a Delta captain (Pet. App. 36a-37a).

In a lengthy opinion containing an exhaustive review of the evidence, the district court determined that petitioner had not proven by a preponderance of the evidence that federal air traffic control ("ATC") personnel had behaved negligently in connection with the attempted landing of D 723. The court also found that petitioner had not demonstrated that any of the allegedly negligent ATC conduct had proximately caused the crash (Pet. App. 115a-116a). The court concluded that "the sole and exclusive cause of the accident was the negligence of the pilot and copilot of D 723" (Pet. App. 116a).

The court of appeals affirmed. It concluded (Pet. App. 29a):

Viewing all of the evidence, even in the light most favorable to [petitioner], we think that the district court had ample support for its finding that there was no casual relationship between air traffic control service and the accident.

The court of appeals found that ATC personnel had performed their duties with regard to D 723 negligently and that the district court's contrary



finding could not be accepted (Pet. App. 15a-26a). But, the court of appeals ruled, the district court's finding on the matter of causation was not "clearly erroneous" (Pet. App. 16a). The court explained (Pet. App. 32a-33a):

[W]e think that the district court was entitled to find that the controller services were unrelated to the last minute loss of control.

\* \* \* \* \*

Without an established causal connection, the fact that the controller did not provide proper services in several respects is not a sufficient basis for holding the Government liable.

#### ARGUMENT

The result reached by the court of appeals is correct. It involves only the application of settled principles to the facts of this case, and further review is not warranted.

1. The court of appeals properly reviewed the district court's judgment according to the "clearly erroneous" standard provided by Fed. R. Civ. P. 52(a). Federal courts of appeals have consistently applied that standard to findings on causation in suits under the Federal Tort Claims Act. See, e.g., *Quinn v. United States*, 439 F. 2d 335 (C.A. 8); *Ingham v. Eastern Air Lines, Inc.*, 373 F. 2d 227, 236 (C.A. 2); *Michael v. United States*, 338 F. 2d 219 (C.A. 6). See also cases cited in 5A *Moore's Federal Practice* ¶ 52.03[1] (2d ed. 1977). Petitioner's characterization of causation as an "ultimate fact" (Pet. 12-15) does not require a different standard of review. The

importance of a particular factual determination to the outcome of a law suit does not affect the criteria by which that determination should be evaluated on appeal.

*Baumgartner v. United States*, 322 U.S. 665, on which petitioner relies, does not support petitioner's position. That case involved an attempt by the federal government to set aside a ten-year-old court order admitting petitioner to citizenship and issuing him a certificate of naturalization. The government alleged that petitioner had procured his citizenship through a false and fraudulent oath of allegiance to the Constitution and laws of the United States. The district court found that the government had submitted adequate proof in support of its charges and, accordingly, entered a decree cancelling petitioner's naturalization certificate. This Court disagreed; the Court's opinion indicates that cancellation of citizenship is a special problem requiring unique rules. The Court explained (322 U.S. at 670-671, 675):

The measure of proof requisite to denaturalize a citizen was before this Court in *Schneiderman v. United States*, 320 U.S. 118. It was there held that proof to bring about a loss of citizenship must be clear and unequivocal.  
\* \* \*

\* \* \* [E]mphasis on the importance of "clear, unequivocal, and convincing" proof \* \* \* on which to rest the cancellation of a certificate of naturalization would be lost if the ascertainment by the lower courts whether that exacting standard of proof had been satisfied on the whole record were to be deemed a "fact"

of the same order as all other "facts," not open to review here.

\* \* \* \*

\*\*\* [W]here the claim of "illegality" really involves issues of belief or fraud, proof is treacherous and objective judgment, even by the most disciplined minds, precarious. That is why denaturalization on this score calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence but is established by later expressions of opinion argumentatively projected, and then often through the distorting and self-deluding medium of memory, to an earlier year when qualifications for citizenship were claimed, tested and adjudicated.

The exacting standards of denaturalization cases do not govern appellate review of ordinary negligence actions. See, e.g., *McAllister v. United States*, 348 U.S. 19. The district court in *McAllister* found that the United States had been negligent in tolerating conditions that were conducive to the transmission of polio, as a result of which plaintiff had contracted the disease. This Court held that the district court's findings on negligence and causation should be reviewed under the "clearly erroneous" standard and, applying that test, discerned sufficient basis in the record for the district court's findings. Mr. Justice Frankfurter, the author of the Court's opinion in *Baumgartner*, would have dismissed the writ of certiorari as improvidently granted. He wrote (348 U.S. at 23-24):

If there is any class of cases which plainly falls outside the professed considerations by which this Court exercises its discretionary jurisdic-

tion, it is cases involving only interpretation of facts bearing on the issue of causation or negligence. The standards of judgment in this type of litigation are well settled. The significance of facts becomes the bone of contention. And the facts stir differences that derive from the very elusiveness of the meaning of the myriad unique sets of circumstances in negligence cases.

The district court here found that petitioner had not sufficiently proved that the behavior of federal ATC personnel, even if negligent, proximately caused the crash of D 723. The court of appeals held that that finding was not clearly erroneous. Under this Court's well-settled rule, when two courts have reached the same conclusion on a question of fact, their findings should be accepted as final "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275. See also *Blau v. Lehman*, 368 U.S. 403, 408-409; *Faulkner v. Gibbs*, 338 U.S. 267, 268; *United States v. Dickinson*, 331 U.S. 745, 751; *United States v. Commercial Credit Co.*, 286 U.S. 63, 67; *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14; *Baker v. Schofield*, 243 U.S. 114, 118; *Towson v. Moore*, 173 U.S. 17, 24. No such showing has been made by petitioner.

2. Petitioner asserts (Pet. 15-19) that the district court's finding on causation was affected by its finding that no ATC employee had been negligent, a finding with which the court of appeals disagreed. This argument is incorrect. The district court's



thorough opinion indicates that the court considered the matter of causation independently of the question whether the conduct complained of constituted negligence (Pet. App. 65a-68a, 74a-80a, 102a, 105a). Moreover, the district court explicitly found that "the sole and exclusive cause of the accident was the negligence of the pilot and copilot of D 723" (Pet. App. 116a). This finding was directly supported by expert testimony (Pet. App. 79a-80a).

3. The district court did not explicitly articulate a definition of "proximate cause," and petitioner maintains (Pet. 19-23) that an incorrect legal standard of causation was applied. Petitioner points to the court of appeals' reliance on the discussion of proximate cause in the *Restatement (Second) of Torts* (Pet. App. 27a), and contends that the court of appeals' reference to the *Restatement* implicitly holds that the district court acted on an improper legal theory. This contention is groundless, as is petitioner's related claim of denial of due process (Pet. 24-28). The district court found *no* causal connection between the alleged negligence of ATC personnel and the crash of D 723. In light of this finding of fact, it was unnecessary for the district court to decide how much causal connection would be required to hold the United States liable. The court of appeals' endorsement of the "substantial factor" test employed in the *Restatement* does not in any way reflect a conviction that the district court had applied some other test or that the district court's conception of "proximate cause" was wrong. If the court of appeals had found

some error of consequence in the district court's approach, it would have said so.

4. Petitioner suggests (Pet. 28-29) that the decision in this case conflicts with *Kohr v. Allegheny Airlines, Inc.*, 504 F. 2d 400 (C.A. 7), certiorari denied *sub nom. Forth Corp. v. Allegheny Airlines, Inc.*, 421 U.S. 978. *Kohr* held that, in light of "the prevailing federal interest in uniform air law regulation, \* \* \* a federal rule of contribution and indemnity among joint tort-feasors should control in aviation collisions \* \* \*." 504 F. 2d at 403, 405.<sup>3</sup>

A finding that actionable negligence proximately caused injury is a logical prerequisite to application of contribution and indemnity rules. The lower courts here found that the conduct of the air traffic controllers had not caused the accident at issue, and, therefore, they had no occasion to consider whether state or federal law should govern contribution and indemnity. This case therefore simply does not present the issue decided in *Kohr*.<sup>4</sup>

<sup>3</sup> The holding of *Kohr* is questionable in light of *Miree v. DeKalb County, Georgia*, No. 76-607, decided June 21, 1977, and the fact that the Federal Tort Claims Act explicitly incorporates state law.

<sup>4</sup> Petitioner observes (Pet. 5-6, 28) that the district court dismissed petitioner's indemnity claims before trial on the ground that Massachusetts law does not recognize a right to indemnification in favor of a tortfeasor who is guilty of active negligence. See note 2, *supra*. This pretrial ruling probably proceeded from the assumption that state law controlled the allocation of liability. But petitioner never asked the district court to apply a federal rule of contribution and indemnity, and, accordingly, may not raise the matter now. More important, the court's subsequent determination on the merits of petitioner's claims rendered any choice between state and federal law academic.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.